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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 704

JAN HILLEGAS,
Petitioner,

vs.

JOE SAMS, JR., COUNTY ATTORNEY FOR LOWNDES COUNTY, MISSISSIPPI, AND PENN TAYLOR, SHERIFF AND CUSTODIAN OF THE COUNTY JAIL OF LOWNDES COUNTY, MISSISSIPPI,
Respondents.

[redacted]

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOE SAMS, JR.
Attorney at Law
Columbus, Mississippi

JOE T. PATTERSON
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
Assistant Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8030

INDEX

[redacted]

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit 3

Facts 3

Argument—

A District Court of the United States Is Precluded from Granting an Application for a Writ of Habeas Corpus in Behalf of a Person in Custody for Violation of a State Statute Unless It Appears That the Applicant Has Exhausted the Remedies Available in the Courts of the State 4

I. Statutory Provision 4

II. Case Law 5

III. No Circumstances Exist to Warrant Interference by a Federal Court 10

Conclusion 11

Table of Cases

Application of Elizabeth P. Wyckoff, 196 F. Supp. 515, 6 Race Rel. L. Rep. 786 10

Bass v. *State*, No. 43,641, decided February 7, 1966 11

Brown v. *Allen*, 344 U.S. 443, 97 L. Ed. 469 8

Brown v. *Rayfield*, 320 F.2d 96, cert. den. 375 U.S. 902 (1963) 10

Davis v. *Burke*, 179 U.S. 399, 45 L. Ed. 249 5

Ex Parte Henry Hawk, 321 U.S. 114, 88 L. Ed. 572 6

Ex Parte Royall, 117 U.S. 241 ..... 9, 10

Fay v. *Noia*, 372 U.S. 391 10
Guyot v. *State*, 175 So.2d 184 (1965) 12
Harper v. *State*, 171 So.2d 129, 251 Miss. 699 (1965) .. 11
Johnson v. *Hoy*, 227 U.S. 245 2
Moses v. *State*, 179 So.2d 9 (October 11, 1965) 11
Stack v. *Boyle*, 342 U.S. 1, 96 L. Ed. 3 7
Thompson v. *Overlade*, C.C.A. 7th, 216 F.2d 492 9
White v. *Ragen*, 324 U.S. 760, 89 L. Ed. 1348 8

STATUTES

Mississippi Code Annotated, Section 2666 3
Title 28, U.S. Code Annotated, Section 2254 .....4, 11

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FACTS

The Petition for a Writ of Habeas Corpus in this matter was filed on January 5, 1965, by Jan Hillegas alleging that she is a resident of Syracuse, New York, and is unlawfully and unconstitutionally restrained of her liberty by Joe Sams, Jr., County Attorney for Lowndes County, Mississippi, and Penn Taylor, Sheriff of Lowndes County, Mississippi, and Custodian of the Lowndes County Jail.

Petitioner was arrested by R. C. Herron, Chief Deputy of Respondent Taylor on December 28, 1964. An affidavit was made by the said arresting officer charging the Petitioner with the offense of vagrancy. Mississippi Code Annotated, Section 2666. Bond was set by the Respondent Taylor at $200.00, which Petitioner did not make. Petitioner was arrested with Dennis Gaston and Dove Green. Upon independent investigation by the Respondents, the said Gaston was found to be a college student and therefore was released without charge. Trial in the Municipal Court of Columbus, Mississippi was set for December ...., 1964. On December ...., 1964, Federal District Judge Claude F. Clayton of the Northern District of Mississippi informed Respondent Joe Sams, that counsel for Petitioner had discussed with him the filing of a Petition for Writ of Habeas Corpus and requested a date for hearing on said Petition. Said Judge further informed Respondent Sams that he could not hear counsel on said Petition before January 5, 1965 and requested the said Sams not to re-set the said trial in

the Municipal Court until after said hearing. Said Respondent Sams, without hesitation and in full co-operation with the said District Judge, re-set said hearing on January 6, 1965. Said Petition for Writ of Habeas Corpus was filed on January 5, 1964, and on that day denied by the said District Court on the ground that Petitioner had failed to exhaust State remedies. Again, the said District Court discussed this matter with the Respondent Sams, requesting that the said Sams stay any and all proceedings against the Petitioner until the Court of Appeals for the Fifth Circuit had acted upon the appeal of said Petitioner. Again, without hesitation and in full co-operation with the District Judge, the said Sams continued the trial of Petitioner until final decision by this Court and *further released said Petitioner on her own recognizance.*

Petitioner admits that she had not exhausted all available State remedies and in fact she has not exhausted any of said remedies.

ARGUMENT

A District Court of the United States Is Precluded from Granting an Application for a Writ of Habeas Corpus in Behalf of a Person in Custody for Violation of a State Statute Unless It Appears That the Applicant Has Exhausted the Remedies Available in the Courts of the State.

I.

Statutory Provision

Title 28, U.S. Code Annotated, Section 2254, provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an ab-

sence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

II.

Case Law

We respectfully submit that Petitioner is without standing before this Court in this proceeding, having exhausted none of the many remedies available to her in the Courts of the State of Mississippi. Her allegation that she has not taken advantage of the remedies available in the State Courts because any such efforts would be unsuccessful are either a conclusion without basis of fact or it is an admission that she is guilty of the offense for which she was arrested.

Petitioner actually plead herself out of Court in this proceeding by admitting in her petition that she has not exhausted her remedies available in the State Courts without alleging any legal justification for her failure so to do. The rule is clearly stated by the Supreme Court of the United States in *Davis* v. *Burke*, 179 U.S. 399, 45 L. Ed. 249, as follows:

"The rule is well settled in this Court that, while there may be a power on the part of the Federal Courts to issue a writ of habeas corpus where the petitioner insists that he has been deprived of his liberty without due process of law, that power will not ordinarily be exercised until after an appeal made to the state courts has been denied."

* * * * *

"The state courts are as much bound as the Federal courts to see that no man is punished in violation of

the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there."

* * * * *

"... not only does the question involve the construction of the Constitution and laws of the state with which the supreme court of the state is entirely familiar, but a ruling by this court that prosecutions by information in the courts of Idaho are invalid might result in the liberation of a large number of persons under sentence upon convictions obtained by this method of procedure. *A step so important ought not to be taken without full opportunity given to the state court to pass upon the question, and without clear conviction of its necessity.*"

In *Ex Parte Henry Hawk*, 321 U.S. 114, 88 L. Ed. 572, Petitioner was convicted of murder in the State Courts of Nebraska. His conviction was affirmed by the Nebraska Supreme Court, and certiorari was denied by the Supreme Court of the United States. Petitioner filed a petition for Habeas Corpus with the Nebraska Supreme Court, and same was denied. He did not file a petition for Habeas Corpus in any lower Court in Nebraska and did not appeal from any adverse ruling of such Court to the Nebraska Supreme Court. He did not seek in the State Courts of Nebraska a Writ of Error Coram Nobis. In denying his application for a Writ of Habeas Corpus, the Supreme Court of the United States said:

"In the application now before us, and in those filed with the United States District Court and the senior Circuit Judge of the Eighth Circuit, petitioner alleges, among other things, that the state court forced him into trial for a capital offense, Neb. Comp. Stat. Sec. 28-401, with such expedition as to deprive him of the

effective assistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment, . . . and that his conviction was based in part of the introduction at the trial of evidence known by the prosecution to be perjured."

* * * * *

"But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge."

* * * * *

"Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. Tinsley v. Anderson, 171 U.S. 101, 104, 105, 43 L. Ed. 91, 96, 18 S. Ct. 805; Urquhart v. Brown, 205 U.S. 179, 51 L. Ed. 760, 27 S. Ct. 459; United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 70 L. Ed. 138, 46 S. Ct. 1; Mooney v. Holohan, supra (294 U.S. 115, 79 L. Ed. 795, 55 S. Ct. 340, 98 ALR 406); Ex Parte Abernathy, No. ....., October 18, 1943 (320 U.S. 219, ante, 1, 64 S. Ct. 13)."

* * * * *

"As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion."

In *Stack* v. *Boyle,* 342 U.S. 1, 96 L. Ed. 3, the Court said:

"In this case, however, petitioners did not take an appeal from the order of the District Court denying their motion for reduction of bail. Instead, they pre-

sented their claims under the Eighth Amendment in applications for writs of habeas corpus. While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution, 28 USC (Supp IV) Sec. 2241 (c) (3), the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceedings has not been exhausted."

In *White* v. *Ragen*, 324 U.S. 760, 89 L. Ed. 1348, the Court said:

"The availability of such a remedy in the Federal district court, turning as it does on the exhaustion of state corrective processes, see Mooney v. Holohan, supra; Ex Parte Hawk, supra (321 U.S. 116, 117, 88 L.Ed. 574, 575, 64 S. Ct. 448), may also depend upon an application to this Court to review the decision of the state court, and upon the disposition of such an application here. Where the highest state court in which a decision could be had, considers and adjudicates the merits of a petition for habeas corpus, state remedies, including appellate review, are not exhausted so as to permit the filing of a petition for habeas corpus in a Federal district court, unless the Federal question involved is presented to this Court on certiorari or appeal from the state court decision. Ex Parte Hawk, supra (321 U.S. 116, 117, 88 L. Ed. 574, 575, 64 S. Ct. 448)."

In *Brown* v. *Allen*, 344 U.S. 443, 97 L. Ed. 469, the Court said:

"Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions, should not be exercised without clear evidence of violation."

* * * * *

"The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the

federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 USC Section 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."

* * * * *

"The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed."

In *Thompson* v. *Overlade*, C.C.A. 7th, 216 F.2d 492, the Court said:

"It will be noted that petitioner does not allege that he exhausted or even resorted to the ordinary method of appeal from his conviction in the Marshall county, Indiana, circuit court. The general statement in his petition that he had fully complied with the doctrine requiring the exhaustion of all state afforded corrective process is not a sufficient showing of exhaustion of state remedies. . . . *The Burden is upon petitioner in such a situation to affirmatively set forth in his petition for habeas corpus what remedies he pursued in the state court and a justification, if any exists, for his failure to pursue any other state court remedy. The burden is not upon the respondent to point out the state court remedies of which petitioner failed to avail himself."*

The case now before the Court is very similar to the facts in *Ex Parte Royall*, 117 U.S. 241. The question in the *Royall* case was whether the United States Circuit Court should deny the writ to a State prisoner *awaiting trial.* The Supreme Court announced that there is a discretion in the Federal Courts to withhold the writ until after the State

has decided the constitutional questions. The Court explained "that discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals or the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between Courts equally bound to guard and protect rights secured by the Constitution."

Royall was cited with approval in *Fay* v. *Noia*, 372 U.S. 391.

III.

No Circumstances Exist to Warrant Interference by a Federal Court

The circumstances set out by Petitioner which she claims warrant the issuance of a Writ of Habeas Corpus by a Federal Court even in absence of her admitted refusal to exhaust numerous available State remedies are identical with the circumstances alleged in *Brown* v. *Rayfield*, 320 F.2d 96, cert. den. 375 U.S. 902 (1963) and *Application of Elizabeth P. Wyckoff*, 196 F. Supp. 515, 6 Race Rel. L. Rep. 786.

Mr. Justice Black and Mr. Justice Clark denied an Application for a Writ of Habeas Corpus filed with this Court by Petitioner Wyckoff on July 26, 1961 because "* * * the factual allegations fall far short of showing that there are not Mississippi State processes available by appeal or otherwise for Wyckoff to challenge her State convictions * * *." Said Order further pointed out that these processes "* * * would effectively protect her constiutional rights, particularly since any denial of such rights by the highest Court of a State can be remedied by appropriate Appellate proceedings in the Supreme Court of the United States."

CONCLUSION

We submit to this Court that the District Court properly denied Petitioner's Petition for Writ of Habeas Corpus and said denial was properly affirmed by the Court of Appeals for the Fifth Circuit. We suggest to the Court that 28 U.S.C. 2254 prohibits the granting of an Application for a Writ of Habeas Corpus in behalf of the Petitioner until she has exhausted remedies available in the Courts of the State of Mississippi, but it is not necessary for this Court to pass upon that question since the action of the United States District Court for the Northern District of Mississippi is correct on the ground that discretion rests in said Court to deny said Petition as a matter of comity as developed in the argument contained in this response and the numerous cases cited in support of said argument.

We further submit to this Court that Petitioner can and will obtain a fair trial in the State Courts of Mississippi. As a matter of fact, it is only necessary to cite a few instances of recent decisions by the Supreme Court of Mississippi which clearly show that it does protect the rights of all litigants and shows careful concern where it is alleged that a racial issue is directly or indirectly involved. In *Harper* v. *State*, 171 So.2d 129, 251 Miss. 699 (1965), and *Bass* v. *State*, No. 43,641, decided February 7, 1966, the Supreme Court of Mississippi reversed the Lower Court on the ground of systematic exclusion of Negroes from the jury. In *Moses* v. *State*, 179 So.2d 9 (October 11, 1965), the Supreme Court of Mississippi reversed the Circuit Court of Pike County and discharged Appellant. Robert Moses (now known as Robert Paris) was found guilty and sentenced for a misdemeanor, in which the affidavit charged that he "on or before the 4 day of October 1961, within the corporate

limits of the City aforesaid, did then and there wilfully and unlawfully disturb the public peace by violent and loud offensive and boisterous conduct calculated to provoke a breach of the peace and leading to a breach of the peace, against the peace and dignity of the State of Mississippi."

In *Guyot* v. *State*, 175 So.2d 184 (1965) the Judgment of the Trial Court was reversed and the Appellant discharged.

RESPECTFULLY SUBMITTED, this ..... day of February, 1966.

JOE SAMS, JR.
Attorney at Law
Columbus, Mississippi

JOE T. PATTERSON
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
Assistant Attorney General of the State of Mississippi

By: .....
WILLIAM A. ALLAIN